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No. 82-1014

In the Supreme Court of the United States

OCTOBER TERM, 1982

LOUIS TOM DRAGNA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's RICO convictions are invalid because he was acquitted on substantive counts charging two of the predicate acts of racketeering and because he was not named in a substantive count charging a third predicate act of racketeering.

2. Whether the district court properly instructed the jury on the elements of a RICO conspiracy.

3. Whether petitioner's statements to FBI agents were properly admitted at trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-24) is reported at 685 F.2d 1208.

JURISDICTION

The judgment of the court of appeals (Pet. App. 24) was entered on September 3, 1982. A petition for rehearing (Pet. App. 25) was denied on November 1, 1982. The petition for a writ of certiorari was filed on December 16, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted of participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c), and of conspiring to commit that offense, in violation of 18 U.S.C. 1962(d). He was sentenced to five years'

imprisonment and fined $50,000. The court of appeals affirmed (Pet. App. 1-24).

The evidence adduced at trial showed that between 1974 and 1978 petitioner was the acting boss of the Los Angeles family of La Cosa Nostra (R.T. 2851-2852, 2915, 2903-2931).[1] In May 1975, petitioner approved a plan, developed by James Fratianno[2] and co-defendants Dominic Brooklier and Samuel Sciortino, to extort money from pornographers Reuben Sturman and Teddy Gaswirth (R.T. 2923-2929, 2945-2947). At a June 1975 meeting, Fratianno informed petitioner of the progress made in the "shakedown" scheme, and petitioner asked Fratianno to suggest some ideas for killing Frank Bompensiero, because Bompensiero was "shooting his mouth off" (R.T. 2957-2959). A few days later, petitioner told Fratianno that he had decided to retire Tommy Palermo, the "consigliere" of the Los Angeles family, and replace him with Bompensiero in order to "relax" Bompensiero and make him easier to kill (R.T. 2959-2960). Thereafter, petitioner and Fratianno met on numerous occasions to discuss their scheme for "shaking down" pornographers; petitioner approved each "shakedown" and told Fratianno to report to him concerning everything he did (R.T. 3000-3002). During the fall of 1975 and winter of 1976, the "family" unsuccessfully attempted a "shakedown" of Reuben Sturman for $20,000 (R.T. 4424-4429). In August 1976, co-defendant Jack LoCicero, whom petitioner appointed to conduct the "shakedown" under Fratianno's supervision, unsuccessfully attempted to extort $20,000 from Teddy Gaswirth (R.T. 2716-2737).

During May 1976, the FBI opened an office in Van Nuys, California, for a fictitious company called Forex, which was purportedly engaged in exporting pornographic films

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[1]"R.T." refers to the Reporter's Transcript.

[2]Fratianno was the government's chief witness at trial.

to Mexico and South America (R.T. 4258-4272). Bompensiero then sought permission to "shake down" Forex, and his request was granted by Fratianno with petitioner's approval (R.T. 3048-3050). In August, co-defendant LoCicero and another man visited Forex and demanded "a piece of the action in order for Forex to remain in business * * *" (R.T. 4298). When asked if they were the "Mafia," LoCicero responded, "[n]o, we're a family" and "[w]e represent the people in Los Angeles" (R.T. 4320). At a later meeting, co-defendant Michael Rizzitello told the undercover agents involved in Forex that he wanted $20,000 up front and $500 a week; the figure was finally set at $5000 up front and $1000 a week (R.T. 4350-4352, 4507-4512). In all, the agents paid $7000 in "shakedown" money (R.T. 4358-4365, 4517-4525, 4383-4386, 4539-4542).

Petitioner and Fratianno devised several plans for murdering Bompensiero, but none proved successful (R.T. 3037-3047). After it was discovered that Forex was an undercover operation, petitioner and co-defendants Rizzitello, Brooklier, and Sciortino all agreed that Bompensiero was an informant and that he should be killed (R.T. 3052-3061). Bompensiero was subsequently murdered in a telephone booth to which he had been lured by a call from co-defendant Brooklier (R.T. 3081-3085).

ARGUMENT

1. Petitioner does not dispute the court of appeals' holding (Pet. App. 16-17) that the evidence was sufficient to establish his involvement in four of the racketeering acts charged in the RICO counts: the Sturman, Gaswirth, and Forex extortions, and the murder of Frank Bompensiero. However, petitioner contends (Pet. 3-5) that his RICO convictions are invalid because he was acquitted on the substantive counts charging the Gaswirth extortion (Count III) and the Bompensiero murder (Count V) and because he was

not named in the substantive count charging the Forex extortions (Count IV). Petitioner's claim is without merit.

Even eliminating from consideration the predicate acts relating to the substantive counts on which petitioner was acquitted, two predicate acts remain, i.e., the Forex and Sturman extortions. Those acts alone are sufficient to support petitioner's RICO convictions. The fact that petitioner was not named in the substantive count charging the Forex extortions certainly does not mean that those extortions could not be charged against him in the RICO counts as a predicate act of racketeering, and the indictment did so charge.

In any event, even if the only predicate acts supporting petitioner's RICO convictions were those that formed the basis of the substantive counts on which he was acquitted, the RICO convictions would survive. It is well settled that inconsistent verdicts rendered in the same proceeding do not require reversal. *Hamling* v. *United States*, 418 U.S. 87, 100-101 (1974); *Dunn* v. *United States*, 284 U.S. 390, 393-394 (1932). Instead, " '[e]ach count is separately considered,' " and, regardless of any inconsistency with another count, " 'if it is supported by the evidence, [it] may stand.' " *United States* v. *Lichenstein*, 610 F.2d 1272, 1279 (5th Cir. 1980), quoting *United States* v. *Romeros*, 600 F.2d 1104, 1105 (5th Cir. 1979). Here, the court of appeals found, and petitioner does not dispute, that despite the acquittals on the substantive counts, the evidence was sufficient to establish petitioner's participation in the Gaswirth extortion and Bompensiero's murder.

The Third Circuit's decision in *United States* v. *Brown*, 583 F.2d 659 (1978), does not support petitioner's argument. There, the court of appeals reversed a RICO conviction where the evidence, although sufficient to prove the commission of the requisite number of racketeering acts,

was insufficient to support two of the predicate acts charged in the indictment and submitted to the jury. The court reasoned that this result was required because it was impossible to determine whether the jury had relied on an impermissible underlying offense to reach its verdict on the RICO count. Whatever the merit of the decision in *Brown*, it is wholly distinguishable from this case. Here the evidence was sufficient to prove petitioner's participation in all the racketeering acts with which he was charged, and there was therefore no danger that the verdict rested upon predicate acts unsupported by the evidence.[3]

2. Petitioner contends (Pet. 5-6) that the district court improperly instructed the jury on the RICO conspiracy count. He alleges that the court failed to advise the jury that, in order to convict petitioner on that count, it must find that he agreed to participate in the affairs of an enterprise in addition to agreeing to commit the predicate acts of racketeering.

The challenged instruction was drafted jointly by attorneys for both sides, including counsel for petitioner, and it evoked no objection whatever. Accordingly, petitioner waived his right to challenge the instruction. Fed. R. Crim. P. 30. In any event, the court of appeals correctly rejected petitioner's claim.

With regard to the RICO conspiracy count, the district court instructed the jury as follows (Pet. 5 n.2):

> [I]t must be proved beyond a reasonable doubt that a defendant conspired to commit any two of the racketeering acts that comprise the pattern of racketeering

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[3]Nor is petitioner aided by *United States* v. *Weisman*, 624 F.2d 1118 (2d Cir.), cert. denied, 449 U.S. 871 (1980). In that case, the court of appeals held that it would have affirmed the defendant's RICO convictions even if two of the predicate acts of racketeering had been improperly charged, because several valid predicate acts remained.

> activities set out in the indictment * * *. In addition it must be proved beyond a reasonable doubt that during the course of the charged conspiracy, first, that the defendant was employed by or associated with an enterprise quote unquote as defined in these instructions, second, that at least two acts of racketeering activity occurred within ten years of each other, that one of such offenses took place after October the 10th, 1970, and that the offenses were connected with each other by some common scheme, plan or motive so as to constitute a pattern and not merely a series of disconnected acts. That through the commission of two or more connected--third, that through the commission of two or more connected offenses, the defendant conducted or participated in the conduct of the enterprise.

As the court of appeals concluded (Pet. App. 22), "[t]hese instructions were adequate to inform the jury of the elements of a RICO conspiracy, and required them to find an overall conspiracy to conduct an enterprise through a pattern of racketeering activity before they could find [petitioner] guilty."

Indeed, the RICO conspiracy instruction was more favorable to petitioner than the law requires in that it stated that to convict petitioner the jury must find that he *actually* "conducted or participated in the conduct of the enterprise [through the commission of two or more racketeering acts]" and not merely that he agreed to do so (Pet. 5 n.2).

3. In October 1976, petitioner was served with a subpoena in connection with a grand jury probe of the "shakedown" of the FBI Forex operation. On October 14, petitioner met at his own request with FBI Agents Jack Barron and John Nance. During the ensuing conversation, petitioner acknowledged, among other things, that he was acting boss of the Los Angeles family of La Costa Nostra (R.T.

4174) and that he had authorized the "shakedowns" of pornography businesses in Southern California (R.T. 4200). Petitioner contends (Pet. 6-8) that these admissions were improperly introduced at trial because they were obtained pursuant to promises of immunity or confidentiality. However, both of the courts below, after reviewing the record, found that no binding promises of confidentiality had been made (see Pet. App. 11). Those findings are not properly subject to further review (see *Berenyi* v. *Immigration and Naturalization Service*, 385 U.S. 630, 635 (1967)), and in any event are not clearly erroneous.

Agents Nance and Barron both testified, at an in camera hearing on petitioner's motion to suppress his statements, that they had not promised petitioner immunity for his statements and that the subject of immunity was never even discussed (R.T. AA 300-301, 303, 309, 337, 359).[4] To the contrary, petitioner was told that he should be careful what he said because he was not being immunized (R.T. AA 301, 337). Petitioner's assertion (Pet. 7) that it was "understood" that his statement would be "confidential" misstates the record. The clear import of the agents' testimony was that if petitioner had ultimately cooperated with the FBI as an informant there might have been some basis for finding an "implied" understanding that his conversations would be kept confidential (R.T. AA 303, 309). But petitioner did not so cooperate.

Nor is there merit to petitioner's suggestion (Pet. 8) that the grand jury subpoena was a ruse designed to cultivate petitioner as an informant. To the contrary, Agent Barron testified that petitioner was subpoenaed as a possible witness against other La Cosa Nostra subjects (R.T. AA 348,

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[4]"R.T. AA" refers to those volumes of the Reporter's Transcript so designated.

4209-4213, 4224-4232). Likewise, Agent Nance testified that petitioner, as boss of an organized crime family, was presumed to have knowledge of the activities of his underlings that would be of use to the grand jury investigation (R.T. AA 315). There is simply no basis in the record for the conclusion that the subpoena was issued for an improper purpose.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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